As regards the two notices to quit the learned judge had considered both notices and held the notices to be valid and effective. We have come to the same conclusion but on somewhat different grounds.

Finally, the question of inadequacy of damages awarded by the learned judge for the loss of revenue from the vegetables. We have already dealt with this point earlier in the judgment.

In view of the foregoing the respondent's cross-appeal is accordingly dismissed.

(8) *Costs*

The learned judge made his order on costs as follows:

"Costs. In the exercise of my discretion I award full costs of the proceedings – claim and counterclaim – to the plaintiff having taken into account all the circumstances of the case including the conduct of the defendants in the manner they went about to gain possession of the six acres of land."

With respect we feel that the basis of the order of the learned judge is not quite correct and cannot be sustained. The main issues before the learned judge were in fact decided in favour of the appellants. It is contended here on behalf of the appellants that the order of possession in respect of the six acres of land and the house granted by the learned judge (orders no. 3 and 4 referred to earlier) would in effect mean that the appellants had successfully maintained their legal rights against the respondent and therefore entitled to costs as of right. In reality however the respondent was in fact successful only in part of his claims.

Since the respondent was partially successful in the High Court he should therefore be entitled to half the costs in the High Court. We accordingly vary the order of the learned judge with the order that the respondent be awarded only half of his costs in the court below.

The appeal is allowed with costs and the cross-appeal is dismissed with costs.

Deposit to be refunded to the appellants.

Appeal allowed, cross-appeal dismissed.

Solicitors: *Shearn Delamore & Co. ; Syarikat Mohideen Abdul Kader.*

LIM KHOO EONG v. TRUSTEES OF LEONG SAN TONG KHOO KONGSI (PENANG) REGISTERED & 2 ORS.

[O.C.J. (Edgar Joseph Jr.) February 3, 6, 12, 17, 19 & March 7, 1986]

[Penang – Suit No. 22-3-86]

Landlord and Tenant – Tenancy of land under expectation of stay as long as tenant wishes - Improvement to dwelling and farming plots by tenant – Development of land by defendants – Dispute – Interlocutory injunction against defendants – Application by defendants to discharge injunction – Whether should be granted – Balance of convenience – Damages – Street, Drainage and Building Act, 1974, s.9 – Specific Relief (Malay States) Act, 1950 (Revised 1974), ss. 7 & 8(1).

The plaintiff is in possession of a vegetable plot of land on which there is a farm measuring about 2 acres forming part of the land known as Holding 2532, Mukim 13, North East District, Penang. The first defendants ("D1") are the registered proprietors of the land. The substituted second defendant ("D2"), Perumahan Farlim (Malaysia) Sdn. Bhd., is the developer charged with the responsibility of developing the land on behalf of D1. The 3rd defendant, Thean Tatt Construction Sdn. Bhd. ("D3"), is the building contractor whose task is to carry out the actual work involved in the development.

The history of the case goes back to prior to the Japanese Occupation of Malaya when the plaintiff's father, one Lim Ah Khim, deceased, who died in 1962, rented from D1 the vegetable plot for vegetable farming and another plot for building a dwelling house, both comprised in the land concerned. The deceased constructed a dwelling house on the building plot and cultivated vegetables and reared pigs on the vegetable plot with a view to profit. It was said that as a result of a belief induced by D1 that the deceased and his family (including the plaintiff and his brother) could stay on the vegetable and building plots and carry on their farming activities for as long as they wished, subject to payment of a nominal rent and keeping the land under cultivation, they expended a substantial sum of money and labour in building and improving the dwelling house and they converted what was once a jungle into a fertile farm. The deceased gave one portion of the farm to the plaintiff and the other portion to his brother. The deceased also gave the dwelling house to the plaintiff, who, after the death of the deceased, was registered by D1 as a tenant of the dwelling house at a monthly rental of $7 which D1 duly received.

The present dispute arose when D1 had proceeded with their plans for development of the land concerned in disregard of the legal fights of the plaintiff concerning the vegetable and building plots. He feared that unless restrained by injunction the defendants would wrongfully enter and take forcible possession of part of his farm, thereby causing irreparable loss or damage to him. He therefore applied for and obtained an interlocutory prohibitory injunction against the defendants. The defendants applied to discharge the *ex parte* injunction but later modified the application to that of limiting the injunction's operation.

Held: (1) the learned judge was satisfied that were the plaintiff to succeed at the trial in establishing his right to a permanent injunction he would not be adequately compensated by an award of damages.

(2) in all the circumstances, the injunction should be maintained and the defendants' application be dismissed with costs. The injunction should apply to the dwelling house plot and to D2, and there should be an order for early trial.

Cases referred to:

(1) *Kechik & Ors.* v. *Habeeb Mohamed & Anor.* [1963] M.L.J. 127.
(2) *Poh Swee Siang* v. *Trustees of Tong Khoo Kongsi* [1986] 1 M.L.J. 53.
(3) *Lavery* v. *Pursell* (1888) 39 Ch.D. 508.
(4) *Frith* v. *Frith* [1906] A.C. 254.
(5) *Ryan* v. *Mutual Tontine Westminster Chambers Assn.* [1893] 1 Ch. 116.
(6) *Atlas Steels (A'lia) Pty. Ltd.* v. *Atlas Steels Ltd.* (1948) 49 SR (NSW) 157.
(7) *Street* v. *Mountford* [1985] 2 All E.R. 289.
(8) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510.
(9) *Pride of Derby & Derbyshire Angling Association Ltd. & Anor.* v. *British Celanese Ltd. & Anor.* [1953] Ch. 149, 182.
(10) *Miller* v. *Jackson* [1977] Q.B. 966, 987.
(11) *Woollhara Municipal Council* v. *Morris* [1966] N.S.W.A. 136.
(12) *Price's Patent Candle Co. Ltd.* v. *London County Council* [1908] 2 Ch. 526, 544.
(13) *Beswicke* v. *Alner* [1926] V.L.R. 72.
(14) *Glenwood Lumber Co.* v. *Phillips* [1904] A.C. 405, 410.
(15) *Yellayi Sannaya* v. *Sannayajulu Ramesham* A.I.R. 1940 Pat. 193.
(16) *Inwards* v. *Baker* [1965] 2 Q.B. 29; [1965] 1 All E.R. 446.
(17) *Williams* v. *Staite* [1979] Ch. 291.
(18) *Belfast Ropework Co. Ltd.* v. *Pixdane Ltd.* [1976] F.S.R. 337.
(19) *Graham* v. *Campbell* (1878) 7 Ch.D. 490, 494.
(20) *A.G.* v. *Albany Hotel Co.* [1896] 2 Ch. 696, 700.
(21) *Beecham Group Ltd.* v. *Bristol Laboratories Pty. Ltd.* (1968) 118 C.L.R. 618, 623.
(22) *Dein & Dein* v. *Bealey* [1960] N.S.W.R. 385.
(23) *Allen* v. *Jambo Holdings Ltd.* [1980] 2 All E.R. 502.

APPLICATION.

Mohideen Abdul Kader (*Miss Meenakshi Raman* with him) for the plaintiff.

R. Rajasingam (*Subash Chandran* with him) for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr.J.: This was a defendants' application, at first, for discharge of an *ex parte* interlocutory prohibitory injunction but later modified to limit its operation.

The interlocutory injunction restrains the defendants, until further order from, *inter alia*, entering a plot of land whereon stands a farm in the possession of the plaintiff in area approximately two acres ("the vegetable plot" and "farm" respectively) forming part of the land known as Holding 2532 Mukim 13 North East District, Penang, ("the land concerned"), and from committing any nuisance, trespass or interference against the plaintiff in relation thereto.

The first defendants, Trustees of Leong San Tong Khoo Kongsi (Penang), ("D1", for short) are the registered proprietors of the land concerned.

The substituted second defendant, Perumahan Farlim (Malaysia) Sdn. Bhd., ("D2", for short) is the developer charged with the responsibility of developing the land on behalf of D1.

The Third defendant, Thean Tatt Construction Sdn. Bhd., ("D3", for short) is the building contractor whose task it is to carry out the actual work involved in the development.

The application arises out of an action in which the plaintiff claims as against all the defendants:

"1. An injunction to restrain the defendants whether by themselves, their servants or agents or otherwise from entering the plot of land in the possession of the plaintiff having an area of approximately 2 acres and forming part of Holding No. 2532, Mk. 13, NED, Penang and/or committing any nuisance, trespass or interference against the plaintiff and his property on the said plot or any other person transacting or seeking to transact business with the plaintiff and/or from doing any act calculated to interfere or damage the plaintiff in his use of the said plot.

2. A declaration that the plaintiff is the tenant and entitled to an equitable interest in the plots of land where his farm and house are situated."

In order to clarify the issues for decision, I shall now refer to the facts which can be garnered from the various affidavits filed in support of and in opposition to the application.

I shall take firstly the case for the plaintiff.

Prior to the Japanese Occupation of Malaya, the plaintiff's father, one Lim Ah Khim deceased, rented from D1 the vegetable plot for vegetable farming and another plot for building a dwelling house ("the building plot") both comprised in the land concerned.

Upon renting the vegetable and building

plots, the deceased Lim Ah Khim constructed a dwelling house now known as No: 189-J, Mukim 13, Thean Teik Road, Air Itam, Penang, ("the dwelling house") on the latter and cultivated vegetables and reared pigs on the former with a view to profit. The photographs of the dwelling house and farm (Exhibit L.1 to Enclosure 2) suggested that this was done according to the methods of good husbandry.

Then followed an important contention. It was said that as a result of a belief induced by D1 that the deceased Lim Ah Khim and his family (which included the plaintiff and his brother) could stay on the vegetable and building plots and carry on their farming activities for as long as they wished, subject to payment of a nominal rent and keeping the land under cultivation, they expended a substantial sum of money and labour in building and improving the said dwelling house. More importantly, they converted what was once a jungle into a fertile farm.

During his lifetime, the deceased Lim Ah Khim partitioned the farm into two portions giving one to the plaintiff and the other to his brother by way of gift. He also gave the plaintiff the dwelling house.

After Lim Ah Khim's death on October 31, 1962, D1, on the plaintiff's request, registered him as a tenant of the dwelling house at a monthly renal of $7 per month, which it duly received from him and, for which, printed receipts were duly issued for the first time. The receipts were in the following form:

"Ground Rent Receipts for Houses

1. Rent collected is for site of house only.

2. No ex-gratia payment will be made when site is required by our Kongsi.

3. Notice is hereby given that all owners of houses, buildings, sheds etc. erected in Sin Kang Estate are not permitted to repair or make alterations, extensions, enclosures, transfer ownership, change attap roof, corrugated iron roof, asbestos roof, pigstys, poultry pens, including the building of new houses etc. unless prior permission in writing has been obtained from the Trustees of the Khoo Kongsi.

Should any ground tenant be found to have infringed any of the above conditions, the Kongsi shall have the right to demolish any building etc. at the expense of the owners, and no compensation or claims will be entertained by the Kongsi.

By Order of the Board of Trustees.
Trustees of Leong San Tong Khoo Kongsi (Pg.) Registered, Penang."

Then followed the allegation which gave rise to the dispute resulting in the institution of the suit herein.

It was said that D1, although they well knew of the plaintiff's legal rights over the vegetable and building plots, and the rights of other residents on the land concerned, had proceeded with their plans for development in flagrant disregard of the same. As a result, the plaintiff feared that D1 would take the law into their own hands and forcibly evict him.

Most particularly, it was alleged (and this was admitted by D1) that D3 had taken steps, such as clearing and filling operations, for the purpose of constructing a road which would pass through the farm.

However, D1, through their agents, sought the plaintiff's consent for this purpose, but he declined it. Whereupon, they said that regardless of objection, the construction of the road through the farm would proceed.

It was next contended that no attempt had been made by D1 to terminate the tenancy by notice although this was an essential formality notwithstanding the death of the deceased Lim Ah Khim (see *Kechik & Ors.* v. *Habeeb Mohamed & Anor.*[1]). In any event, it was contended that his tenancy could not be terminated by mere notice.

The plaintiff therefore feared that unless restrained by injunction the defendants would wrongfully enter and take forcible possession of part of his farm, thereby causing irreparable loss or damage to him.

Upon the above facts, supported by affidavit and subject to the usual undertaking as to damages, I granted the plaintiff an ex-parte interlocutory prohibitory injunction, pending further order in the terms I have already mentioned, with liberty to the defendants to apply to set aside.

It was in these circumstances that the defendants then moved for a discharge of the interlocutory injunction.

I shall now turn to consider the case for the defendants.

In his affidavit affirmed to on January 28, 1986 (Enclosure 8), filed in support of the application for discharge, one Khoo Peng Tee, said that

having been one of the trustees of D1, for more than 40 years, he was well aware of their general policies as to the occupation of the land concerned and, in particular, about the facts relating to the plaintiff's case.

By way of introduction, he mentioned that the land concerned had an area of more than 309 acres; at first, this was undeveloped. However, over the years, various plots were given on ground rent to numerous persons to settle thereon, for building houses and for agricultural farming, subject to conditions made known at the time of settlement and subsequently, from time to time, in accordance with rules and regulations made by D1.

It was said that conditions for occupation of dwelling houses and farms were different.

To illustrate, rent receipts for dwelling houses and farms were reproduced.

Khoo next made a somewhat legalistic point. He said that it was the consistent policy of D1 "not to allow or recognize any transfer or devolution or transmission of the right of occupation of a vegetable plot and to treat it (as) a licence personal to and not transferable by the holder for the time being registered with Khoo Kongsi." Dealing with the particular circumstances of the plaintiff's case, he said that the plaintiff's occupation of the vegetable plot was "merely on sufferance."

Then, dealing with the proposed access road through the plaintiff's farm, he said that it would not affect any house "except by amicable compromise and *ex gratia* payment."

The proposed access road which D1 wished to construct, would be only 30 feet wide and would not pass through or affect the plaintiff's dwelling house or pigsty, though it would pass through the plaintiff's farm in respect of which he held only a bare licence.

He denied that the defendants were attempting to evict the occupants of houses in violation of their legal rights by taking the law into their own hands.

In his affidavit affirmed to on January 28, 1986 (Enclosure 9), one Ng Bock Tye, a Director of D2 said that it had taken over the housing development project referred to in these proceedings since April 1983. Furthermore, that D2 now held a 99-year registered lease dated March 24, 1983 over the land concerned.

He pointed out that Perumahan Farlim (Penang) Sdn. Bhd., of which he was also director, was a separate entity from D2 and had therefore been wrongly cited as a co-defendant in these proceedings. This was conceded by counsel for the plaintiff, and a consent order made discharging the interlocutory injunction as against the former and substituting the latter as the second defendant.

The plaintiff affirmed an affidavit in opposition to the application for discharge, it being Enclosure 14.

He challenged Khoo Peng Tee's knowledge of the conditions of his late father's tenancy.

He affirmed that on several occasions his late father had told him that he had been invited by D1 to open up a portion of the land which was then under jungle and to settle there. In return, his father, was promised that he and his family could stay on the land concerned as long as they wanted subject to the regular payment of rent and the land being kept under cultivation.

In reliance on the said promise, the plaintiff went on to allege that from the age of ten years, he and his brother had helped his father to develop unproductive jungle land into a valuable farm expending much money, time and labour in the process. It was also said that they depended solely on the produce of the land and the sale of pigs for their survival.

At first, apart from the requirements for punctual payment of rent and keeping the land under cultivation, there were no conditions imposed upon the tenancy of the farm and the dwelling house. Then, some time in the seventies, D1 acting unilaterally and without the agreement of the tenants, began imposing conditions by endorsement on the rent receipts.

D1 who had a well-organised system of supervision of estates, including weekly visits by trustees, were informed, by the plaintiff of his father's death on October 31, 1962 soon after the event and were content to allow the plaintiff and his brother to carry on farming provided they paid the rent.

Accordingly, ever since the plaintiff's father's death, the plaintiff and his brother have been culti-

vating and improving their respective portions of the farm in the belief, induced by D1's conduct, that they were the lawful tenants of the farm with an equitable right in it.

In 1974, the dwelling house was registered in the name of the plaintiff and his nephew one Lim Bak Guan. This was to enable the pig rearing licence to be changed from the plaintiff's father's name to that of the plaintiff.

The plaintiff next turned his attention to D2. He said, it was the successor to Perumahan Farlim (Penang) Sdn. Bhd., the original second defendant and had entered into a joint venture agreement with D1, to develop the said land.

Pursuant to this agreement, and in return for a nominal consideration, a 99-year lease in favour of D2 was executed. This was to enable the developer to raise funds and to enable it to evict the residents who are in lawful occupation – so it was said.

It was contended that in these circumstances, the developer, even before execution of the lease, had full knowledge of the plaintiff's right in relation to the land concerned and could not therefore pray in aid the doctrine of the *bona fide* purchaser for value without notice.

By a second supplementary affidavit affirmed to on February 5, 1986, Ng Bock Tye, the Managing Director of D2, exhibited a sketch plan (being Exhibit "NBT-1") designed to show, with precision, the route, width and precise limits of the proposed 30-ft. wide excess road intended to be constructed over the land concerned and which, it was conceded, would pass through the plaintiff's farm but would not affect his dwelling house.

This access road, did not follow the projected 100-ft. road reserve edged yellow in the sketch, "NBT-1", because D2 did not wish to affect the occupancy of any structures or houses.

However, he acknowledged that at some future time, D2 would have to construct proper roads, as part of the infrastructure, as projected and shown as a 100-ft. road reserve in the sketch plan.

Dealing with the balance of convenience, Ng pointed out that whereas, on the one hand, the damage to the farm which would be suffered by the plaintiff, should the 30-ft. wide access road be constructed, would be a loss of revenue of merely some $5,900 per month, on the other hand, the loss likely to be sustained by the plaintiff, should the interlocutory injunction remain in full force and effect, would be very considerable.

Amplifying this part of the case, he spelt out D2's development plans.

He said D2 had achieved various stages of construction of no less than 100 units of single storey terrace and semi-detached houses in land known as "Area 8" for which the 30-ft. temporary access road was required.

The Local Authority would not issue Occupation Certificates for these houses until the access road was available. Accordingly, the developer would be liable in substantial damages to purchasers should the access road not be constructed as a matter of urgency.

He concluded, on a somewhat intimidating note, that "in addition to the damages, and the continuing damages of at least $30,000 a day, with effect from January 22, 1986, the developer had some $9,950,000 tied up in the sale proceeds of these 100 houses which would be held up if the *ex parte* injunction were allowed to remain."

In the face of this second supplementary affidavit by Ng, the plaintiff did not remain passive and do nothing. He responded with a supplementary affidavit affirmed to on February 5, 1986 (Enclosure 18) and a further affidavit affirmed to on February 6, 1986 (Enclosure 19).

He began by stating that the proposed road works would affect no less than 13 tenants whose house numbers he specified. He knew this not only from information from these tenants but also from agents or servants of the defendants, confirmed by markings on the land concerned.

The defendants, he added, had already started levelling more than 30 feet of the land concerned situated immediately before the levelled portion in his possession. To illustrate, he exhibited a set of photographs being Exhibit "L.1". Furthermore, as a result of a search conducted by his solicitor, Miss Meenakshi Raman, it was known that the width of the road reserve required by the authorities was 66 feet and that approval was subject to certain conditions.

As regards the width of the access road required by the authorities, D2 attempted to clarify this by their engineer's letter dated February 7, 1986 being Exhibit "A". According to this letter,

the Jabatan Kerja Raya had approved the construction of a 100-ft. wide access road.

As regards the conditions, subject to which the approval for the access road was given, D2 attempted to clarify this by a letter dated January 17, 1985 from the Majlis Perbandaran Pulau Pinang being Exhibit "C" addressed to D1's architect, M.K. Teoh & Associates, paragraph 5 of which reads:

TRANSLATION

"5. The Council has decided to impose a condition, by way of direction, that the developers have to settle the question relating to satisfactory compensation to the existing squatters/tenants before any construction work is commenced."

He then made, what I thought was an attractive point of law, based on sections 7 and 8(1) of the Specific Relief (Malay States) Act, 1950 (Revised 1974) which provide as follows:

"Recovery of specific immovable property.

A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

Suit by person dispossessed of immovable property.

8(1). If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit."

This is how he put it:

"The defendants were fully aware of my rights and the rights of the other lawful tenants on the said land before commencing their alleged development and yet they decided to proceed with it regardless of our rights and without recovering possession of the portions in my possession and the portions in the possession of the other tenants in accordance with due legal process."

It was argued that such high handed conduct on the part of the defendants was fraught with the danger of a breach of the peace. To fortify this submission, counsel for the plaintiff referred to certain events relating to Penang High Court Civil Suit No: 17/84, an action similar to the present one, the subject matter being a different portion of the land concerned and wherein D1 were also one of the defendants. It was said that in that case, the events concerned did give rise to a breach of the peace resulting in a death, which was the subject of an Inquest No: 47/83, held in the Magistrate's Court, Georgetown, ending in a verdict as follows: "Death caused by the negligent discharge of his gun by P.C. Arul."

In this context counsel also referred to the judgment of Seah F.J. (as he then was) speaking for the Federal Court, in *Poh Swee Siang* v. *Trustees of Tong Khoo Kongsi*[2] restoring an interlocutory injunction.

Dealing with the question of the balance of convenience the plaintiff said this:

"I am supplying vegetables and pigs to the market. If the road is constructed through my farm it would cover up the well which is supplying water to my vegetable farm and to the pig stys, destroy the pipe carrying water to the vegetable farm, and the crop on my farm. As a result I would not be able to cultivate my farm and rear my pigs and the source of livelihood of seven members of my family will be completely ruined."

As I observed at the outset, although, at first, counsel for the defendant sought to argue for a dissolution of the interlocutory injunction, in the face of the welter of points raised by his opponent, he retreated from that position and confined his contention to seeking only an order limiting the operation of the injunction so as to enable the defendants to construct a 30-ft. wide access road which, it was said, would only affect the plaintiff's farm and that, too, to a very limited extent and for which concession they were prepared to give the necessary indemnity as to damages.

Most particularly, counsel sought to persuade me to limit the operation of the injunction in accordance with the terms of a proposed draft order (Exhibit "PDO") the essential parts of which I now reproduce:

"... *IT IS ORDERED* that the Order of Court herein dated the 22nd day of January 1986 (Entered No. 90 of 1986, Court Enclosure herein No. 4) be varied in the following manner, that is to say –

1. Notwithstanding the interim injunction against them by the said Order of Court, the 2nd and 3rd defendants are hereby permitted to construct an access road of 30 feet width in accordance with good Civil Engineering practice without in any way injuriously affecting adjoining portions of land as shown coloured pink in the Sketch Plan being Exhibit "NBT-1" to the said Second Supplementary Affidavit of Ng Bock Tye) (Court Enclosure No. 17 herein).

2. The 2nd and 3rd defendants are to ensure that the said road works do not in any way disturb or injuriously affect any other portion of land or lands claimed to be occupied by the plaintiff, or his vegetable farm or pig sty or his dwelling house or the cultivation of any crops growing thereon or the animal husbandry carried on by the plaintiff thereon.

3. The 2nd defendants are to appoint a suitably qualified valuer or appraiser at their own cost and expenses to super-

vise compliance by the 2nd and 3rd defendants with the matters set out in paragraph 2 above and to make suitable or necessary recommendations to enable the plaintiff to carry on his vegetable farming and animal husbandry on the portions of the said land not affected by the said road works, as heretofore.

4. The 2nd defendants are to comply with any such recommendations with reasonable dispatch and at their own costs and expenses.

5. The 2nd and 3rd defendants are to ensure that the water supplies for the plaintiff's purposes are not injuriously affected.

6. The 2nd defendants are to indemnify the plaintiff and keep him indemnified during the continuance of these proceedings for the loss of the highest value crops growing on the portion of land affected by the said road works as mutually agreed upon or at the current prevailing market rates of the Federal Agricultural Marketing Authority.

AND IT IS ORDERED that all parties be at liberty to apply as necessary in case of any questions arising in relation to the matters aforesaid."

In the first place, I cannot help observing that should an order be made in terms of the plaintiff's draft aforesaid, it would give rise to obligations so complex or unclear as to lead to applications to Court for enforcement of its order or for further definition of the obligations of the parties. The prosecution of works envisaged in the order may also impose upon the Court the intolerable burden of continued superintendence to ensure that the works are carried out. It is not difficult to cite an anthology of cases where injunctions have been refused in such circumstances. My choice is: *Lavery* v. *Pursell*[3]; *Frith* v. *Frith*[4]; *Ryan* v. *Mutual Tontine Westminister Chambers Assn.*[5] and *Atlas Steels (A'Lia) Pty. Ltd.* v. *Atlas Steels Ltd.*[6] The individual judge's own intuitive sense of what is the most appropriate course to take in the particular circumstances is probably an important or even deciding factor.

Alternatively, even if the obligations of the parties under the proposed order are sufficiently clear and definite, it would appear that performance of the obligations by the defendants will involve the doing of so many acts that a Court should not burden itself with the impossible task of determining the many disputes that may arise as a result.

In the second place, upon the affidavit evidence which I have reviewed, the defendants are *ex hypothesi* the wrongdoers, for they admit that they are proposing to construct a 30-ft. wide access road through the plaintiff's farm. I might as well say that it would be wrong to assume that such construction if proceeded with without Local Authority approval, would not amount to a contravention of section 9 of the Street, Drainage and Building Act, 1974. However, it would not be right to determine this question in proceedings such as these.

The argument that the plaintiff occupied his farm on terms of sufferance, in other words, as a mere tenant at will or, as a bare licence, is clearly not open to me to decide on mere affidavit evidence bearing in mind the contrary arguments of Counsel for the plaintiff that his client was a tenant whose occupancy was protected by an equity entitling him to occupy the same for as long as he wanted, particularly, in view of his undoubted occupation for more than 40 years. A recent House of Lords case illustrates that the question whether a tenancy or a licence is to be inferred can be fraught with difficulty: (See *Street* v. *Mountford*[7]).

I am fortified in my approach to this question by what Lord Diplock said in his speech in *American Cyanamid Co.* v. *Ethicon Ltd.*[8], "It is no part of the Court's function at this stage of the litigation" – that is, in considering a motion for an interlocutory injunction, I interpolate – "to try to resolve a conflict of evidence on affidavits as to the facts and on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations." Indeed, at one stage of the argument, Counsel for the defendants conceded that there was a serious question to be tried as regards this issue.

Accordingly, the defendants being *ex hypothesi* the wrongdoers, for the reasons stated, it is only in very exceptional circumstances that a limitation of the terms of the interlocutory injunction should take place where such limitation may cause substantial inconvenience or injury to the plaintiff. Thus there is authority for saying that the onus is on the defendant "to satisfy the Court that justice requires that a further suspension should be granted." (See *Pride of Derby & Derbyshire Angling Association Ltd. & Anor.* v. *British Celanese Ltd. & Anor.*[9]; *Miller* v. *Jackson*[10]).

Accordingly, it follows, that if a limitation of an interlocutory injunction would result in inconvenience to the plaintiff, it is necessary to balance that inconvenience against the diminution of hardship that is sought by the defendants and to take

account of other such relevant discretionary considerations, in deciding whether it is just to grant something less than the absolute unconditional injunction to which there is *prima facie* a right: See *Miller* v. *Jackson, ibid.* and *Woollhara Municipal Council* v. *Morris.*[11] Therefore, hardship to third parties or indeed any of the matters that may ordinarily be taken in determining whether an injunction should issue may be taken into account in determining whether its operation should be limited.

Applying this test, circumstances, not strong enough to justify the refusal of relief altogether may, nonetheless, justify a suspension of relief. (See *Price's Patent Candle Company Ltd.* v. *London County Council*[12]).

But, as I have stressed, the plaintiff has *prima facie* a right to an injunction and, in the absence of inequitable behaviour, – and I can find none – or of some other special consideration – and, again, I can find none – it is not ordinarily reasonable that he should be obliged to undergo a substantial inconvenience or detriment merely in order to enable the defendants, who must be regarded as wrongdoers or potential wrongdoers, to comply more easily with an order of Court. (See *Pride Of Derby & Derbyshire Angling Association Ltd. & Anor.* v. *British Celanese Ltd. & Anor., ibid.* and *Beswicke* v. *Alner*[13]).

If the defendants suffer undue hardship should the interlocutory injunction in its present form remain in force then they have only themselves to blame. They are the authors of their own misfortune for, as counsel for the plaintiff rightly pointed out, they should first have compromised with the plaintiff or have evicted him by due process of law before embarking on their development scheme.

Sections 7 and 8(1) of the Specific Relief (Malay States) Act, 1950, give statutory protection to the plaintiff for their object is clearly to discourage forcible dispossession. Disputed rights must therefore be decided by due process of law, and not otherwise, and existing peaceable possession will be protected against disturbance without regard to the question of its origin. (See *Glenwood Lumber Co.* v. *Phillips*[14]; *Yellayi Sannaya* v. *Sannayajulu Ramesham*[15]).

I have mentioned more than once that the defendants had abandoned their original position of seeking a discharge of the interlocutory injunction and instead had confined their contention to seeking a limitation of its effect.

In case, however, they should have a change of heart, and revert to their original position then, *ex abundanti cautela,* I shall deal with the question of whether damages would be an adequate remedy for the plaintiff.

If the plaintiff is correct in his contentions then, quite apart from the contractual rights of tenancy which he enjoys, the facts would give rise to an equity which would protect his occupation of the vegetable plot and the building plot (with dwelling house thereon), so that were the defendants to bring an action to evict him they would be acting in violation of the original representation made to the deceased Lim Ah Khim, as to the duration of his tenancy, and in reliance on which a detriment was incurred. In such a situation, the Court could refuse an action for possession and declare that the plaintiff could remain in occupation for as long as he uses the vegetable and building plots for the purposes agreed: (See *Inwards* v. *Baker*[16]; *Williams* v. *Straite*[17]).

"Indeed," say *Meagher and Gummow,* in their textbook on 'Equity: Doctrines & Remedies'

> "that whenever a plaintiff can show that some equitable right is vested in him which the defendant has threatened to infringe, or which the defendant has already infringed and is either continuing to infringe or about to infringe repeatedly, the plaintiff may obtain an injunction as of right."

This proposition accords with reason and justice for, should it be otherwise, the denouement could be tantamount to enabling a wrongdoer to buy out his victim compulsorily at a price fixed by the Court.

Bearing in mind the above considerations and the fact that the plaintiff and his family depend for their livelihood on the farm, I am satisfied that were he to succeed at the trial in establishing his right to a permanent injunction, he would not be adequately compensated by an award of damages.

If, contrary to what I have held, there was doubt as to the adequacy of damages being a proper remedy available to the plaintiff, then I went on to consider the balance of convenience.

It will be recalled that the plaintiff had alleged in his Supplementary and Further Supplementary Affidavits, being Enclosures 18 and 19 respectively, that were the defendants to proceed with their proposed road works 13 other tenants on the land concerned would be affected. More importantly, he had alleged, giving particulars (reproduced above) and without contradiction, that it would have devastating effects on his means of livelihood.

On the other hand, the defendants have alleged severe financial losses which would follow were the interlocutory injunction to remain in force in its present form.

It has been said that once the investigation has reached the third stage, the decision of the Court, whether in favour of or against an injunction, will inevitably involve some disadvantages to one or the other side which damages cannot compensate.

In *Belfast Ropework Co. Ltd.* v. *Pixdane Ltd.*[18] it was held not to be a conclusive argument in the defendant's favour on the balance of convenience in a commercial case that the grant of an interlocutory injunction would delay the development of his business, and thereby deprive him of the opportunity of earning profits with which to contest the substantive hearing; if that was so, he should not have embarked on the venture knowing that litigation would probably ensue.

In this case too the defendants had embarked on their venture knowing full well that litigation would ensue. Accordingly, being amply satisfied that the balance of convenience favoured the plaintiff rather than the defendants, I was of the view that the *status quo* ought to be preserved.

Lest I be accused of an oversight, Counsel for the defendants laid much stress on the sufficiency of the plaintiff's undertaking as to damages when arguing for a discharge of the interlocutory injunction. It may well be that this argument was abandoned when counsel for defendants later confined his contention merely to a limitation of its operation. However, I shall assume, in his favour that this is not so.

On this basis, I propose to review the law applicable regarding this part of the case.

There is authority for saying that an undertaking as to damages "ought to be given on every interlocutory injunction." (See *Graham* v. *Campbell*[19]). But the better view is that in special circumstances this may be either unnecessary or inappropriate. So, in *A.G.* v. *Albany Hotel Co.*[20] North J. said: "If in the exercise of his discretion a judge should think fit to dispense with such an undertaking he could of course do so and there are cases in which judges have done so; but this would only be under special circumstances." (See also *Beecham Group Ltd.* v. *Bristol Laboratories Pty. Ltd.*[21]).

A possible exception to the requirement of an undertaking is a plaintiff's poverty: *Dein & Dein* v. *Bealey.*[22]

There is also support for this view in *Allen* v. *Jambo Holdings Ltd.*[23] The passages in the judgments to which I should like to refer are, as follows:

> "... There is one other point that I must mention. It is said whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw, L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft."
>
> (*per* Denning, M.R. at page 505 d).
>
> "... What he has said is that one ought to look more cautiously at the situation because in commercial disputes it is usually the case that a plaintiff will be in a position to meet any potential liability under his undertaking in damages if he asks for a Mareva injunction and then loses the action. But, as Lord Denning, M.R. has pointed out, questions of financial stability ought not to affect the position in regard to what is the essential justice of the case as between the parties."
>
> (*per* Shaw L.J. at page 505 h).

So, looking at the matter broadly, I asked myself: would it be just and equitable to discharge the injunction or even limit its operation simply because the plaintiff is unable to give a meaningful undertaking as to damages, thus resulting in the plaintiff being at least partially dispossessed of his farm, in breach of explicit statutory provision, and perhaps, his well covered up, the pipes carrying water to his farm destroyed and his means of livelihood jeopardized? The balance of justice and convenience called aloud for a negative conclusion.

In all the circumstances, I considered that I should maintain the injunction and the defendants' applications were accordingly dismissed with costs. I further ordered that the injunction should apply to the dwelling house plot and to D2, the substituted second defendant. Finally, there was an order for early trial.

Order accordingly.

Solicitors: *Syarikat Mohideen Abdul Kader; Rajasingam & Co.*

TAN LIAN HENG v. KILANG PAPAN AMAN SDN. BHD. & ANOR.

[O.C.J. (Shaik Daud J.) December 31, 1983]

[Kuantan – Civil Suit No. 179 of 1980]

Damages – Foot – Right foot crushed and deformed – Loss of wages – Pain and suffering.

Tort – Negligence – Plaintiff's right foot crushed by forklift in the course of employment.

On or about October 22, 1975, the plaintiff was run over by the tyre of a forklift belonging to the first defendant and driven by the second defendant. As a result, his right foot was crushed and deformed and he walked with a limp. The accident occurred during and in the course of the plaintiff's employment as a forklift attendant. The plaintiff was 17 years old at the time of the accident. He averred that the defendants were negligent and claimed against his employers loss of wages for 40 months, expenses and general damages. Both defendants have denied liability and the alleged negligence.

Held: (1) on the facts disclosed in the evidence, the second defendant is wholly liable and the plaintiff had in no way contributed to the accident;

(2) the plaintiff should be awarded damages of $28,000.00 for loss of total earnings, $30,000.00 for pain and suffering, $16,300.00 for loss of earning capacity, and $33,900.00 for future loss of earning capacity and interest at 3% p.a. on special damages from the date of accident to the date of service and thereafter at 6% p.a.; no interest on the amount for future loss of earnings; 6% p.a. on the rest of the award from the date of service of the writ to the date of judgment and thereafter at 8% p.a.

Cases referred to:

(1) *Murtadza b. Mohd. Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.
(2) *Jefford* v. *Gee* [1970] 1 All E.R. 1202.

CIVIL SUIT.

Mahinder Singh for the plaintiff.

Loy Tuan Bee for the defendants.

Cur. Adv. Vult.

Shaik Daud J.: This is a claim by the plaintiff against his employers arising out of an accident at the worksite. The Statement of Claim states that the plaintiff was employed by the first defendant, a private limited company, and that the second defendant was employed by the first defendant at a sawmill at Batu 7½ Jalan Gambang, Kuantan. On or about October 22, 1975, the plaintiff was run over by the tyre of a forklift belonging to the first defendant and negligently driven by the second defendant. This accident occurred during and in the course of the employment where the plaintiff suffered personal injuries and loss. The plaintiff in his Statement of Claim contends that as a result of the accident his right foot was crushed and deformed. He now claims loss of wages for 40 months, expenses and general damages. Both the defendants have denied liability and the alleged negligence.

The plaintiff in his evidence states that he is 25 years old and that on October 22, 1975 he was working as a forklift attendant. The forklift No. CE 6401 was driven by the second defendant. The plaintiff then describes his work as an attendant. He says that he had to follow the forklift wherever it went. At the sawmill where the plaintiff worked huge pieces of logs were cut into small pieces and planks and the forklift was used to convey the cut pieces to be stacked outside the mill. The plaintiff states that in order for the forklift to lift the sawn timber from the ground there had to be a space between the sawn timber and the ground. This space was created by placing two pieces of wedge called "long" under the sawn timber. As an attendant it was the plaintiff's duty to follow the forklift to the place where the sawn timber was to be stacked, then plaintiff would place the two "longs" or wedges on the ground after which the driver of the forklift would lower the load of sawn timber onto the two wedges.

The plaintiff states that on the day in question the forklift driven by second defendant had taken sawn timber from inside the mill to be stacked outside the mill, near the fence forming the boundary of the mill compound. Along this fence was a gravel road used by timber lorries to bring timber to the mill. The plaintiff states that on the day in question the gravel road was uneven as there were depressions caused by tyre marks of the timber lorries. As usual the plaintiff says he followed the forklift which was loaded with sawn timber to the side of the fence. As usual, the plaintiff went to get the two wedges which were by the fence. The plaintiff took one of the wedges